

FEDERAL CIRCUIT COURT OF AUSTRALIA

NGUYEN v MINISTER FOR IMMIGRATION &
ANOR

[2018] FCCA 3504

Catchwords:

MIGRATION – Administrative Appeals Tribunal – application for a Partner (Provisional) (Class UF) visa – whether the Tribunal had a real and meaningful engagement with the applicant’s evidence in respect of the parties long term plans – whether the Tribunal failed to consider evidence relevant to s 5F(2) of the *Act* – whether the Tribunal failed to consider evidence relevant to the parties commitment to each other – whether the Tribunal failed to consider matters relevant to the financial aspects of the claims – no jurisdictional error made out – amended application dismissed.

Legislation:

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth), r.1.15A, cl. 309.211

Applicant:	THI TRUC PHUONG NGUYEN
First Respondent:	MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	PEG 295 of 2017
Judgment of:	Judge Street
Hearing date:	29 November 2018
Date of Last Submission:	29 November 2018
Delivered at:	Perth
Delivered on:	29 November 2018

REPRESENTATION

Counsel for the Applicant:	Mr D Blades
Solicitors for the Applicant:	Legal Care Australia
Solicitors for the Respondents:	Ms B Rayment Sparke Helmore

ORDERS

- (1) The name of the first respondent is changed to Minister for Immigration, Citizenship and Multicultural Affairs.
- (2) Grant leave to the applicant to rely upon the amended application filed on 1 November 2018.
- (3) The amended application is dismissed.
- (4) The applicant pay the first respondent's costs fixed in the amount of \$5,000.00.
- (5) **DATE OF ORDER: 29 November 2018**
- (6)
- (7)
- (8)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT PERTH

PEG 295 of 2017

THI TRUC PHUONG NGUYEN

Applicant

And

**MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS**

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

Background

1. This is an application for a Constitutional writ within the Court's jurisdiction under s 476 of the *Migration Act 1958* (Cth) ("the *Act*") in respect of a decision of the Administrative Appeals Tribunal ("the Tribunal") made on 4 May 2017 affirming the decision of the delegate not to grant the applicant and Partner (Provisional) (Class UF) visa.
2. The visa applicant applied for the visa on 14 October 2014 on the basis of his relationship with the sponsor, the review applicant. On 22 October 2015 the delegate found the applicant failed to meet the criteria for the grant of the visa because the delegate was not satisfied

the applicant and the sponsor were in a genuine and continuing relationship.

3. The review applicant applied for a review and appeared before the Tribunal to give evidence and present arguments on 23 February 2017. The Tribunal also received oral evidence from the visa applicant and review applicant's mother and siblings of both the visa and review applicant as to the genuineness of the relationship. The Tribunal referred to there being a number of witnesses who had provided written statements and the Tribunal accepted those statements reflect that the witnesses believed the relationship to be genuine.
4. The Tribunal identified the requirements for the grant of the visa and, in particular, the meaning of spouse in s 5F of the *Act* and the need to take into account all of the circumstances of the relationship, including evidence of the financial and social aspects and the nature of visa applicant's household and their commitment to each other as set out in r 1.15A(3) of the *Migration Regulations 1994* (Cth) ("the *Regulations*"), which the Tribunal attached to the decision.
5. The Tribunal accepted that the parties were married on 12 January 2014, which was registered on 13 January 2014.
6. The Tribunal considered to the requirements of r 1.15A(3) of the *Regulations*. The Tribunal considered the financial aspects of the relationship and expressly referred to the visa applicant and her husband's brother assisting financially with the application fee and also an airfare to travel to Vietnam in 2014 for the spending of time with her husband. The Tribunal referred to the difficulty of creating joint accounts where people live in separate countries. The Tribunal in the circumstances identified the constraint on the pooling of resources and sharing of day to day experiences and gave little weight to that factor.
7. The Tribunal considered the nature of the household and found that the parties live in different countries and spent little time together, and they had been unable to establish a joint household and the Tribunal identified giving little weight to that factor.
8. The Tribunal considered the social aspects of the relationship. The Tribunal identified that the review applicant provided a number of

statutory declarations from the review applicant's family members as well as from the visa applicant's family members stating that they were aware of the relationship and believe that it is genuine. The Tribunal referred to evidence being given by family members that the relationship was genuine and that the parties wanted to be reunited.

9. The Tribunal referred to the visa applicant's siblings residing in Australia and believing the relationship to be genuine. The Tribunal explored with the review applicant's mother why no family members attended the daughter's wedding. The Tribunal took into account the explanation of work commitments preventing them from attending. The Tribunal found the evidence of the review applicant's mother evasive when questioned about the relationship, particularly as to why no one from the family attended the wedding. The Tribunal referred to the explanation advanced that it was not considered the review applicant's first marriage, as she has been in a previous relationship and while not married, they were in a de facto relationship and had two children together.
10. The Tribunal referred to the evidence that the visa applicant's family paid for the wedding. The Tribunal had found that no one from the review applicant's family or any friends of the review applicant's family attended the wedding.
11. The Tribunal referred to being satisfied the visa applicant's immediate family in Vietnam and Australia were aware that they were legally married and referred to the formal sworn statements providing little information as to the basis of their opinions that the relationship is genuine. The Tribunal found that while some of the family members have met the visa applicant, none had interacted with the couple at a personal level over a period of time.
12. The Tribunal identified its concern that no member of the review applicant's family attended the wedding and that no family member was present to represent her family during the celebrations. The Tribunal did not accept the explanations for the failure to attend. The Tribunal referred to the review applicant's brother indicating that his relationship with his sister had broken down over the last few years. The Tribunal found the failure of any family member to attend the

wedding suggests the review applicant's family did not consider it to be a genuine and ongoing relationship.

13. The Tribunal referred to the proposition that it considered that none of the sworn statements provided by the review applicant's family as well as the visa applicant's family set out any reasons for why they believed the relationship is genuine.
14. The Tribunal continued to refer to being satisfied that the visa applicant's family are aware that the review applicant and visa applicant are legally married and found the evidence provided gives little information as to their opinion of the nature and genuineness of the relationship between the parties. The Tribunal found there was little evidence from any of the visa applicant's friends as to their opinion of the nature and genuineness of the relationship between the parties or whether they socialise with the parties when the applicant was in Vietnam. The Tribunal found there is little evidence from any of the visa applicant's friends as to how the visa applicant represents himself to them apart from the review applicant and whether they perceive him as being in a married relationship.
15. The Tribunal acknowledged the difficulties in the circumstances of a couple living apart, but was not satisfied that the parties have, over the three years of marriage, socialised their relationship to the extent of being recognised and related to as a couple by their friends, extended family members and wider community.
16. The Tribunal identified concern at the general absence of social evidence relating to the relationship and the lack of recognition of the relationship in Australia among the review applicant's wider family, work colleagues and the wider community. The Tribunal was also concerned at the general absence of social evidence relating to the relationship among the visa applicant's friends and wider community in Vietnam.
17. The Tribunal found the social aspects of the relationship are not consistent with parties being in a genuine and continuing relationship and the Tribunal gave significant weight to this factor.

18. The Tribunal considered the nature of the commitment of the persons to each other. The Tribunal referred to the travel by the sponsor to Vietnam. The Tribunal found that it had been provided with numerous Optus accounts in a particular name, being the sponsor's sister, as evidence that there is regular communication between the sponsor and the applicant. The Tribunal noted some of the accounts were duplicated and others were single pages and did not appear to be associated with copies of the accounts provided. It was in that context that the Tribunal acknowledged that there are numerous calls to the same number in Vietnam and that many are of short duration. The Tribunal noted the explanation the short duration was to let each other that they are being thought of.
19. The Tribunal referred to the expense of telephone calls and that the parties communicate regularly by other means through a computer such as Skype. The Tribunal noted that the only evidence of regular communication provided was copies of telephone accounts and that the list does not indicate any meaningful conversations between the parties, especially as the majority of the calls were for short periods. The Tribunal noted the explanation of the review applicant that the accounts were in the sister's name as she bought the phone for her and she transferred funds into her sister's account when payment was due.
20. The Tribunal referred to the evidence from the review applicant that she speaks to the visa applicant daily and when they started to regularly communicate. The Tribunal accepted there were constraints on the review applicant due to the care of her children. The Tribunal was not however satisfied that the evidence indicates a mutual commitment to a shared life together and gave little weight to the provision of funds by the review applicant to her husband in Vietnam.
21. The Tribunal was not satisfied that the social aspects of the relationship are consistent with a genuine and continuing relationship. The Tribunal found there was very little social recognition of the relationship and little evidence as to other's opinion of the nature and genuineness of the relationship and the Tribunal placed significant weight on that factor.
22. The Tribunal found there was little evidence to support that they provided companionship to each other and draw emotional support

from each other. The Tribunal found there was little evidence that the parties have communicated meaningfully with each other during the time apart. The Tribunal referred to the parties wishing to be reunited and living in Australia but found there was little evidence provided as to their mutual obligation and their long term plans.

23. The Tribunal found it was a concern as to the limited knowledge of the review applicant's mental health issues by the visa applicant and the Tribunal would have expected that as they claim to have been in a genuine and continuing relationship and in regular contact, that the visa applicant would have had a greater awareness of the review applicant's mental health issues. The Tribunal placed significant weight on that factor.
24. The Tribunal was not satisfied there was a mutual commitment to a shared life together to the exclusion of all others and that the relationship is genuinely continuing and that parties live together and not separately or apart on a permanent basis.
25. It was in these circumstances the Tribunal found the applicant did not meet the criteria and in cl 309.211 of the *Regulations*. The Tribunal was not satisfied at the time of the visa application the parties were in a spousal relationship. The Tribunal affirmed the decision under review.
26. **Before this Court**
27. The grounds in the amended application are as follows:

1. The Tribunal made a jurisdictional error by failing to properly consider a matter that it was required to consider in considering all of the circumstances of the relationship between the visa applicant and the review applicant pursuant to reg. 1.15A(2) and reg. 1.15A(3) of the Migration Regulations 1994 ("Regulations").

Particulars

a. Subregulation 1.15A(3)(d)(iv) of the Regulations required the Tribunal, in considering the nature of the persons' commitment to each other, to consider whether the visa applicant and the review applicant see the relationship as a long term one.

b. It was necessary for the Tribunal to make a finding in relation to the subjective elements of the evidence of the visa applicant

and the review applicant as to whether they each see the relationship as a long term one, prior to making an objective determination of that question.

c. The Tribunal failed to make a finding in relation to the subjective elements of the evidence of the visa applicant and the review applicant as to whether they each see the relationship as a long term one.

d. Further, the Tribunal failed to engage in an active intellectual process directed at that criterion (subregulation 1.15A(3)(d)(iv)).

e. Alternatively, or in addition, the Tribunal failed to properly consider whether the visa applicant and the review applicant see the relationship as a long term one by failing to consider the evidence provided by the visa applicant and the review applicant as to their long-term plans as expressed individually by them and set out in their statutory declarations (CB 235-241 at [64]-[73]; CB 486-497 at [132]-(140)).

2. The Tribunal made a jurisdictional error by failing to consider evidence relevant to the question whether the visa applicant and the review applicant are in a married relationship as defined by s 5F(2) of the Migration Act 1958 ("Act").

Particulars

a. Under s 5F(2)(b) of the Act, the Tribunal was required to consider whether the relationship between the visa applicant and the review applicant is genuine and continuing.

b. Members of the families of the visa applicant and the review applicant provided statutory declarations in which they not only stated that the relationship between the visa applicant and the review applicant is genuine and continuing, but also set out reasons why they believe the relationship between the visa applicant and the review applicant is genuine:

i. the visa applicant's brother, whose statutory declaration was made on 9 February 2017 (CB 223-225), paragraphs 2-25;

ii. the visa applicant's brother, whose statutory declaration was made on 9 February 2017 (CB 226-228), paragraphs 2-24;

iii. the review applicant's brother, whose statutory declaration was made on 13 February 2017 (CB 229-230), paragraphs 5-13;

iv. the review applicant's mother, whose statutory declaration was made on 11 February 2017 (CB 231-234), paragraphs 3-32;

v. the review applicant's sister, whose statutory declaration was made on 19 May 2016 (CB 242-243), paragraph 4;

vi. the review applicant's brother, whose statutory declaration was made on 19 May 2016 (CB 244-245), paragraph 4.

c. The Tribunal stated at [32] (CB 622) that: "The Tribunal considers that none of the sworn statements provided by the review applicant's family as well as the visa applicant's family set out any reasons for why they believe the relationship is genuine. "

(Emphasis added)

d. In their statutory declarations, the family members of the visa applicant and the review applicant set out numerous reasons why they believe the relationship is genuine.

e. The Tribunal made a jurisdictional error by failing to consider the reasons clearly set out in the family members' statutory declarations as to why they believe the relationship is genuine.

3. The Tribunal made a jurisdictional error by failing to consider evidence relevant to the nature of the persons' commitment to each other, a matter prescribed by subregulation 1.15A(3)(d) as one that the Tribunal was required to consider pursuant to reg. 1.15A(2) and reg. 1.15A(3) of the Regulations.

Particulars

a. The visa applicant and the review applicant provided evidence in their statutory declarations to the Tribunal that they constantly keep in contact with each other through video calling and messenger through the internet (CB 486 at [4]; CB 495 at [122]-[123]; CB 235 at [4]; CB 238-239 at [57]-[59]).

b. Further, the review applicant's sister and brother provided evidence in their statutory declarations that the visa applicant and the review applicant have been in contact by Facetime (CB 242; 244).

c. The Tribunal noted that (CB 623 at [39]): "Due to the expense of telephone calls, they communicate regularly by other means through a computer such as Skype."

d. The Tribunal went on to state at [39]: "The Tribunal notes that the only evidence of their regular communication provided was copies of telephone accounts and this does not indicate any meaningful conversations between the parties, especially as the majority of the calls are for very short periods. "

e. The Tribunal erred in noting that the only evidence of their regular communication provided was copies of telephone accounts, because evidence of regular communication through the internet had been provided:

i. in the statutory declarations of the visa applicant, the review applicant, and

ii. in oral evidence given to the Tribunal.

4. The Tribunal made a jurisdictional error by failing to consider a matter that it was required to consider in considering the financial aspects of the relationship between the visa applicant and the review applicant pursuant to reg. 1.15A(2) and reg. 1.15A(3)(a) of the Regulations.

Particulars

a. Subregulation 1.15A(3)(a)(ii) of the Regulations required the Tribunal to consider any joint liabilities.

b. Subregulation 1.15A(3)(a)(iv) of the Regulations required the Tribunal to consider whether one person in the relationship owes any legal obligation in respect of the other.

c. The review applicant stated in her statutory declaration that for one of her trips to Vietnam, she and the visa applicant borrowed money (\$3000.00) from the visa applicant's brother, which was to be repaid by both of them (CB 493, [97]-[99]).

d. The visa applicant stated in his statutory declaration that the money, in the sum of \$3000.00, used to pay for the airfare for the review applicant to visit him in Vietnam on one of her trips there, was loaned to him by his brother (CB 237 at [37][38].)

e. The visa applicant further stated in his statutory declaration that he had not yet repaid the amount of \$3000.00 (CB 237 at [39]).

f. In his statutory declaration, the visa applicant's brother stated:

i. "I previously lent \$3000.00 to (the visa applicant). I believe the money was for (the review applicant) to pay for the airfare for her to visit Vietnam." (CB 226 at [14]); and

ii. (the visa applicant) and (the review applicant) have not repaid this money to me yet. (CB 227 at [15]).

g. By borrowing the \$3000 for the airfare for the review applicant, the visa applicant incurred a legal obligation in the form of a debt owed to his brother in respect of the visa applicant, a debt that remained outstanding at the time of the Tribunal hearing.

h. In its decision, the Tribunal failed to consider the \$3000.00 debt incurred by the visa applicant in respect of the review applicant, this being a financial aspect of the relationship that it was required to consider under reg. 1.15A(3)(iv).

i. Alternatively, the Tribunal failed to consider whether the debt of \$3000.00 was a joint liability incurred by the visa applicant and the review applicant, this being a financial aspect of the relationship that it was required to consider under reg. 1.15A(3)(ii).

28. **Ground 1**

29. Mr Blades of counsel, on behalf of the applicant, in relation to ground 1, submitted that the Tribunal had failed to comply with the obligation of taking into account the matter identified in r 1.15A(3)(a)(iv) of the *Regulations*. Mr Blades contended that there needed to be an express finding made in respect of whether the parties see the relationship as a long term one.

30. The Tribunal's reasons are not to be read with a keen eye for error. It is patent from the Tribunal's reasons dealing with nature of the person's commitment to each other and in particular, in paragraph 47, the reference to their long term plans that the Tribunal took into account the mandatory requirements under the particular regulation.

31. Mr Blades submitted that the Tribunal had to make a finding as to whether the parties did, in fact, see the relationship as a long term one. The substance of the Tribunal's finding as to there being little evidence provided as to their mutual obligation and their long term plans is such

a finding and meets the requirements of the regulation. A further finding was not required in that regard.

32. Mr Blades submitted that there had not been a real and meaningful engagement with the applicant's evidence in respect of their long term plans. The Tribunal expressly referred to their desire to be reunited and living in Australia. The Tribunal's reasons as summarised above reflect a real and meaningful engagement with the applicant's evidence and submissions. The reasons reflect a thoughtful process in respect of all the factors under r 1.15A(3) of the *Regulations*. No jurisdictional error as alleged in ground 1 was made out.

33. **Ground 2**

34. In relation to ground 2 Mr Blades submitted that the Tribunal had failed to comply with its obligations in relation to considering whether the relationship was genuine and continuing. Mr Blades specifically referred to the various statements that had been provided by the visa applicant's brothers, the review applicant's brother, the review applicant's mother, the review applicant's sister and the review applicant's brother. The Court was taken to the statutory declarations. Mr Blades focused on paragraph 32 of the Tribunal's reasons and contended that the statement that none of the sworn statements set out any reasons for why they believe their relationship is genuine is incorrect.

35. The Tribunal's reasons are not to be read with a keen eye for error. The literal construction advanced by Mr Blades of paragraph 32 is not a fair reading of the Tribunal's reasons. It is apparent from reading the Tribunal's reasons as a whole, as referred to above, that the Tribunal expressly referred to the statutory declarations and took the same into account, specifically in relation to the genuineness of the relationship. That was referred to in paragraph 21. In that context paragraph 32, on a fair reading, reflects an adverse finding by the Tribunal in relation to the adequacy of the reasons advanced as to believing the relationship to be genuine.

36. I do not accept that the Tribunal failed to take into account the sworn statements. I do not accept the submission that there was a failure to have a really meaningful engagement with the applicant's evidence and

submissions in respect of the issue of whether the relationship is genuine and continuing. The Court was invited to find from the statements what might be said to be reasons as to why the individuals believed the relationship to be genuine. This was, in substance, an invitation to this Court to engage in an impermissible merits review.

37. The statement from the review applicant's brother asserting a belief in relation to the relationship in paragraph 2 and summarising the background in relation to the marriage, and the failure to attend the wedding and sometimes seeing the review applicant at the market and statements about Vietnamese culture and the fact that:

They have never discussed their future with me.

38. but that the maker of the statement believes they are a good couple and maintain an assertion of a belief as to the relationship being genuine and continuing is not a basis to find that the Tribunal did not take into account the relevant statutory criterion. Nor do those matters establish any error on a fair reading of the Tribunal's reasons as a whole.

39. The statutory declaration of the visa applicant's brother referring to the marriage and the breakup by the review applicant of her de facto relationship and not attending their wedding and opinions as to the parental approval of the marriage and a reference to lending money to the sister for the visa applicant to pay the airfare for her to visit Vietnam which the visa applicant and review applicant have not yet repaid and the sister appearing to be very happy and belief as to being a good couple and belief as to the relationship being genuine, do not support any error in the reasons of the Tribunal read as a whole. The Court is not satisfied that the Tribunal failed to have regard to the evidence.
40. The statutory declaration from the review applicant's brother referring to having known the visa applicant for four years and asserting a belief as to the genuineness of the relationship and does not identifying any proper basis upon which should be inferred that the Tribunal failed to have regard to the same in the findings made when the reasons are read as a whole.

41. The statement by the review applicant's mother asserting a genuine and continuing relationship and asserting that the family knows and supports the marriage and communications with the review applicant and the visa applicant and referring to the fact that she does not ask in detail about the relationship with the review applicant and expressing her opinion about the relationship and that it is genuine and continuing, again does not identify a proper basis upon which it should be inferred that the Tribunal had failed to take into account that statutory declaration when the reasons are read as a whole.
42. The statutory declaration by the visa applicant being a supplementary statement was also provided to the Tribunal and there is a statutory declaration from the sister of the review applicant asserting contact between the review applicant and visa applicant by phone and FaceTime and asserting the relationship is genuine and does not identify any proper basis upon which the Court should infer there was a failure by the Tribunal to have regard to the statutory declaration when the reasons are read as a whole.
43. There was a further statutory declaration by the visa applicant's brother asserting that the relationship is genuine and continuing is made in the statutory declaration and the reason advanced for the failure to attend the wedding and asserting that they are in contact with each other every day over phone and FaceTime, and asserting beliefs that the relationship will continue, again does not identify a proper basis upon which the Court should infer that the Tribunal failed to have regard to that statutory declaration when the reasons are read as a whole.
44. The Court does not accept the contention advanced that the Tribunal failed to have regard to the statutory declarations in determining whether or not the relationship is genuine and continuing. No jurisdictional errors as alleged in ground 2 is made out.
45. **Ground 3**
46. In relation to ground 3 Mr Blades submitted that there was a failure to have a real and meaningful engagement with the evidence advanced in respect of the commitment of the parties to each other. In respect of their regular contact, Mr Blades referred to paragraph 39 of the Tribunal's reasons in which the Tribunal said:

The Tribunal notes that the only evidence of their regular communication provided was copies of telephone accounts and this does not indicate any meaningful conversation between the parties, especially as the majority of the calls were for short periods.

47. It is patent from the Tribunal's reasons, as summarised above, that the Tribunal was aware that there were other means of communication which were not exhaustibly defined as being through a computer such as Skype.
48. Further, the Tribunal's reasons are not to be read with a keen eye for error. The reference to evidence of the regular communication was clearly referring to documentary evidence in respect of accounts and was not intended to convey on a fair reading that the Tribunal was unaware of or had not taken into account the evidence expressly referred to in respect of the regular communication referred to at the commencement of paragraph 39, as well as the means of communication identified in paragraph 39. The Tribunal's reasons reflect a thoughtful process in respect of the evidence and submissions in respect of all the factors under r 1.15A(3) of the *Regulations*. No jurisdictional error as alleged in ground 3 is made out.
49. **Ground 4**
50. In relation to ground 4, Mr Blades submitted that there was a failure by the Tribunal to expressly consider the requirements of r 1.15A(3)(a)(iv) and in the alternative (ii) of the *Regulations*. The argument was advanced on the basis of alleged lending of money to the visa applicant. The evidence to which the Court was taken entirely supports the finding by the Tribunal in respect of the financial aspects of the relationship that the review applicant's husband's brother assisted financially with the application and also an airfare for her to travel to Vietnam in 2014 to spend time with her husband. The reference in that regard was clearly a reference to the assistance provided in respect of the airfare. There is no proper basis when reading the Tribunal's reasons as a whole, as summarised above, to find any failure as alleged.
51. Mr Blades submitted that there should have been an express finding as to whether one person in the relationship owes a legal obligation to the other in respect of that assistance. No such finding was required. It is

apparent on a fair reading of the Tribunal's reasons that the Tribunal took into account the mandatory matters identified in respect of r 1.15A(2)(a)(ii) and (iv) of the *Regulations* by reference to the assistance identified. No further finding was required by the Tribunal. No jurisdictional error as alleged in ground 4 is made out.

52. **Conclusion**

53. Accordingly, the amended application is dismissed.

I certify that the preceding forty-six (46) paragraphs are a true copy of the reasons for judgment of Judge Street

Date: 20 February 2019